

# Mercer Law Review

---

Volume 44  
Number 2 *Leads Edition - Making a Case for  
Constitutional Entitlements*

Article 10

---

3-1993

## Democracy in the Age of Television

Theodore Y. Blumoff  
*Mercer University School of Law*

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Theodore Y. Blumoff, *Democracy in the Age of Television*, 44 Mercer L. Rev. 653 (1993).

This Essay is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# Democracy in the Age of Television

by Theodore Y. Blumoff\*

"This is not American. This is Kafka-esque."

Clarence Thomas, to the Senate Judiciary Committee during his second round of hearings, October 12, 1991.<sup>1</sup>

## I.

### (REPORTAGE)

"High-tech lynching." . . . "Tabloid headlines." . . . "Sordid." . . .  
"Worm holes in the system." . . . "Mockery." . . . "Ugly, tawdry." . . .  
"Travesty." . . . "Search and destroy." . . . "Feeding frenzies." . . .  
"Witch hunt." . . . (Yes, many witch hunts.) . . . "God awful mess." . . .  
"Bizarre." . . . "Scorched earth." . . . "Moral free fall." . . . "Faustian  
bargain." . . . "Morally despicable." . . . "Organized thought police." . . .  
"Open season on sleaze." . . . "Raucous, bruising, chaotic, Roller Derby."

Roller derby! . . . And: . . . "Cheap soap opera." . . . "Cleverly  
designed plot." . . . "Frank Capra." . . . (Wrong! "No Frank Capra movie  
was ever rated R."<sup>2</sup>) . . . "Cecil B. Demille." . . . "Circus." . . . "Degrad-  
ing circus." . . . (Yes, many circuses too. But emphatically wrong; after

---

\* Professor of Law, Mercer University. St. Louis University (Ph.D., 1976); Washington University (J.D., 1982). So many friends have braved comment on this piece that I scarcely know where to begin, but I will start with Jack, David, Sidney, Hal, Laura, Mel, Emily, and Jane. And hey, Mary, thanks for taking the risk.

1. *Thomas Senate Confirmation Hearing*, 101st Cong., 2nd Sess. (1991).

2. Tom Shales, *The Senators' Final Say and Television's Blinking Eye*, *WASH. POST*, Oct. 16, 1991, at C1.

all, "A circus is fun. At a circus no one gets hurt."<sup>3</sup>) . . . "Tragedy." . . . "Disgusting tragedy." . . . "Made for Television."

"Surreal." Wrong, again. This is not irrational reality played out on a silver screen here, thank you.

"Bad trial!" But great TV!

## II.

### (VERY UN-KAFKA)

Consider Kafka's K, living mind's true terror: defense in ignorance of charge; the accused without knowledge of harm, compulsively rummaging through empty attic of memory. Public worlds inhabit private thoughts: seeking evidence without the logic of offense—compelled consignment to futility. The judge we speak of was no K. Pressed with the exquisite detail of indictment, this J forbore proof. Private worlds inhabit public thought . . . titillating. J wore a robe to construct this Caesar's future. But get this: J refuses the past! Totally, right down the line. Judicial temperament? "J unwilling to examine the evidence!" Forswears confrontation. This is not surreal; this is not Kafka! This is Democracy in the Age of Television.

## III.

### (THE PREDICAMENT)

Here's the problem in a nutshell: How do you capture stage-managed chaos—a national video blast of pure electricity, 110 volts of high-powered horizontal stripes on the screen that opens windows to the soul? Montage Americana. A scream and a howl. Sublime and absolutely ridiculous: a lightning fast roller-coaster ride lit with arc lights and strobes. Phshew . . . hot current across exposed electrodes. A political word-video on PTV; we're talking "Pol Television," instant replay analysis and staccato voices everywhere: book-lined halls of ivy and corner joints for liquid repast. Junkies and pols, bosses and secs, doctors and lawyers and indian chiefs. Step right up and pick a side; enjoy it with your team. It was real and imagined, delicate and coarse, us and them. But just us. Come on in. Shake hands with your neighbor.

---

3. Scott Simon, *Weekend Edition* (National Public Radio broadcast, Oct. 12, 1991).

So many ideas of decency and fair-mindedness were brutalized . . . that it became almost a therapeutic necessity to invent a narrative that might give meaning to events . . . experienced as a kind of psychic explosion.<sup>4</sup>

Welcome.

#### IV.

##### (A SOLUTION?)

First, consider the invented and the real, if you can; one plays in our imaginations, the other disputes that edifice. Invention and authenticity collide and we recoil—invariably. Worse, we deny; we beat back verity with a sneer and phrase. Summon simile and metaphor—keep your distance, us from us. It's like something familiar, we want to say. Okay, but if it's only "like," it's not us. So we don't ask, "Hey, who are we?" We ask: "What the heck happened?" Or "What went wrong?" We're not interested in honest reflections; we'd rather loose new demons on lexical playfields.<sup>5</sup> Avoiding the real, ask: What is this aberration? What are *THEY* doing? Why *THIS* villainy?

#### V.

##### (THE GAME'S AFOOT)

"X-rated Senate hearings won higher TV audience than finishing games of the baseball season," press declares.<sup>6</sup> The gall. Sex beats baseball! Humph! Maybe . . . sex and baseball? I mean, why not? Sex and beer and baseball—come to think of it. Sex and cars, sex and jeans, sex and credit, sex and music, sex and news, sex and instant coffee—Can you believe it? Ice cream too? Sex and everything. Sex is Us. Sex kills, sex lies, sex sells. Sex, sex, sex. Sex and TV. Aha!

I think we're onto something here. But this is like the Vargas Girls; 50s Playboy and a hot T-Bird. Pen and ink— invention, deception, erection. This ain't new. It's all sport, sport and games. The medium of emotion betrays honest discourse. What, no cognitions?

Who's to know?

---

4. *The Talk of the Town*, THE NEW YORKER, Oct. 28, 1991, at 29.

5. The phrase is borrowed from TONY TANNER, *CITY OF WORDS: AMERICAN FICTION*, 1950-1970 33-49 (1971) (describing the fiction of Vladimir Nabokov and Jorge Luis Borges).

6. Tim Cornwell, *Sensitivity Wins the Supreme Court Battle*, THE EUROPEAN, Oct. 18-25, 1991, at 13.

## VI.

## (KINGS AND KNAVES)

Switch now. Remember: "Cleverly designed plots," says J to his accusers. Hmm. Step back.

We're into theater, plain and simple.

Act 1, Scene 1: Cynical Caesar touches rags-to-riches person of color; "Let the bastards dare reject this Horatio. Get my jester!"

But can Caesar really establish an entitlement for Horatio? Doubtful, at best. All agree—all but faux Caesar—that he's not ready for this high court. But what the heck, it's just THE COURT, Caesar's Court, a court of mere words, a marching court, a marching band. He doesn't need to!

Enter media jester. "Metaphor, Caesar, language and symbol." As if he didn't know, this man of flags who pledges convenient allegiance. "Why, we can spin it any-damn-way we choose, Caesar. No foundations here, nothing firm. Let the bastards search in vain, quixotic fools. Caesar maker of small screen myths. Caesar declares: 'The finest Horatio in all the land. None is more deserving.' Oh, Caesar, through your recreative power, we impose coherence; we define culture and this is why you are our Caesar."

"Wait a minute. Issues, what of issues?" asks Caesar's sycophant. Poor guy; he didn't get it, didn't get it at all.

Enter Horatio.

Media Jester: "Here's the rotation, boy. Pitch 'em curve balls. They say 'Abortion,' 'R v. W,' you say, what? What?"

Horatio: "What?" "Abortion?" "What; an abortion? What's an abortion? Never heard of it."

Media Jester: "Natural Law, what? What? Hum it to me, Baby; hum it to me."

Horatio: "What?" "Natural Law?" "What, a Natural Law? What's a Natural Law? Child's play."

"R. v. W.? Never read it. I'm Tabula Rasa, I am; Tabula Rasa, I am, I am."

Media Jester: "Atta boy. He's great, Caesar. This kid's terrific."

7. But consider this, dear readers:

Since most Justices come to this bench no earlier than their middle ages, it would be unusual if they had not . . . at least formulated some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution . . . . It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Caesar's sycophant: "But he's given speeches, written articles, even."

Poor guy. He didn't get it; he still didn't get it.

—And the critics decry Horatio's denials:

—"[C]ontrary to all intellectual expectation."<sup>8</sup>

—He's either lying or indifferent to constitutional issues. Pure opportunism either way;<sup>9</sup>

—"[H]eroically unreflective."<sup>10</sup>

And the Bastards, abso-friggin-lutely tongue-tied. Last seen wringing hands. Affirmative action. Contest this useful cynicism and dare danger. Oppose him, they fear, and oppose people of color, all of them. "To be or not to be?" That's their question, their only question.

First class pusillanimity, these friends of color.

And what say some people of color?

[Caesar] did not listen [to Blacks] because he did not believe he had to. And it is one more example of whites making an effort to choose who black leaders are and/or should be.<sup>11</sup>

## VII.

### (SPEAK MEMORY)

As if they ever listen.

No this isn't new at all. Only scenes change. This is us, this is the bad.

## THE OLD

(circa May 15, 1951)

—Wisconsin's Republican "Boss" Tom Coleman. Darkened, odor and smoke-filled room; strategy for defeating the Democrats in 1952:

"It all comes down to this: are we going to try to win an election or aren't we?"<sup>12</sup>

---

Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J.) (explaining in a separate memorandum why he had not recused himself during consideration of a policy he had helped formulate before joining the bench).

8. Joseph Nellis, *An Imperfect Proceeding*, NAT'L L.J., Oct. 28, 1991, at 15.

9. Ronald Dworkin, *Justice for Clarence Thomas*, N.Y. REV. BOOKS, Nov. 7, 1991, at 41.

10. Michael Kinsley, *TRB: Liar or Boob?*, THE NEW REPUBLIC, Oct. 21, 1991, at 4.

11. Interview with Wilbert A. Tatum, Publisher and Editor-in-Chief of the New York (Amsterdam) News, *All Things Considered* (National Public Radio, Oct. 13, 1991).

12. ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 103* (1970) (quoting Tom Coleman).

(February 9, 1951)

—Wheeling, West Virginia, to a radio audience.

“I have in my hand,” cried Sen Mc, “a list of 205—a list of names that were made known . . . .”

Wheeling Intelligencer, Feb. 10, 1950.<sup>13</sup>

(Or was it 57, like Heinz 57? Or 73 as in nothing? Or just 3 as in . . . ?)

### THE NEW

(October 8, 1991)

—Washington, D.C.; Senator from Ks. to Capitol Hill Press Corp, on why the Senate Republicans agreed to a one week stay on the final vote of Horatio's confirmation.

“‘There is no reason to delay if you have the votes.’”<sup>14</sup>

(OCTOBER 12, 1991)

—Washington, D.C.; National Television Audience. Senator from Wy, frantically searching(?) for numerous, just-received documents, fumbles with inside breast pocket.

“‘. . . statements from her former law professors . . . . Watch out for this woman!’”<sup>15</sup>

### THE OLD

(June 9, 1954)

—Washington, D.C.; National Television Audience

Little did I dream you could be so reckless and so cruel . . . . If it were in my power to forgive your reckless cruelty, I [would] do so . . . , but your forgiveness will have to come from someone other than me. Have you no sense of decency, sir, at long last? Have you left no sense of decency?<sup>16</sup>

13. *Id.* at 49 (quoting Senator Joseph McCarthy).

14. R.W. Apple, Jr., *The Thomas Nomination: A Pause to Reconsider*, N.Y. TIMES, Oct. 9, 1991, at A1 (quoting Bob Dole).

15. See Howard Rosenberg, *Truth Only Gets Paid Lip Service at Hearing*, L.A. TIMES, Oct. 16, 1991, at F1.

16. GRIFFITH, *supra* note 12, at 259 (quoting Joseph L. Welch during the Army-McCarthy Hearings).

## THE NEW

(October 12 &amp; 13, 1991)

—Washington D.C.; National Television Audience. Senator from Pa. faces camera. Genius of perjury.

The “P” word. “P.” “P.” “P.” “I prosecuted ‘P-ers’ and I know.” “She’s destroyed; her credibility is totally destroyed.”

—Same venue, different scene

Senator from Ma.—impotent from past peccadillos and worse— faces colleagues and national TV audience.

“There is no proof [the lady] has perjured herself and shame on anyone who suggests that she has.”<sup>17</sup>

—Same venue, same scene, Senator from Pa. replies.

“We don’t need characterizations like shame from the Senator from Ma.”<sup>18</sup>

Have we no decency? I mean, have we no decency at long last?

## VIII.

(BAD TRIAL REDUX, OR “THE BASTARDS’ CONCOCTION”)

How difficult is truth. Where was its complexity? What happened? Did we overlook the intricacy of proof in the compression of time, or recklessly disregard it? Are we contemptuous of the difficulty in determining truth? Yes, contempt. Truth is a storm on a political parade; or is it just a damned annoying drizzle? It sure doesn’t play well on TV; unkind cameras.

TV. Anger plays on TV. Anger and fire; they reach directly through the screen and clutch us, right where we live. Instantly; bingo; gotcha. Composure? Sometimes it plays, but not as ineradicably. It takes too long, lacks pop, looks detached. Composure is for the silver screen; Myrna Loy and William Powell—suave, urbane, composed, not down mean and dirty. And composure versus anger? NO WAY! Not in a thunderbolt, TV battle fixed on soundbites and more—combat flares and candles. Can’t trust the eyes. Kodacolor, here, automatic film advance: snapshots in rapid se-

17. R.W. Apple, Jr., *The Thomas Nomination: Senate Confirms Thomas*, 52-48, N.Y. TIMES, Oct. 16, 1991, at A1 (quoting Ted Kennedy).

18. *Id.* (quoting Arlen Specter).



quence on a TV screen—bzzt, bzzt, bzzt, bzzt—but the images never move.

## IX.

(AND THE GAME WENT ON)

“Now batting”

Lady. Cool, deliberate, swinging away: “Long Dong Silver.”

“Pitching”

J, angry denial; turn and fire the fastball: “High-tech lynching.”

Close on the soundbite scale, but no brainer in the box score. We’re talking emotional—high—hard ones again, and grooved—slow ones, pubic hair in pop cans, sure, but the delivery’s all slo-mo. Anger wins, easy.

—Read this from the box scores, sports fans:

Senator (D. Ala.), with phone calls running 9 to 1 in favor of Horatio, tells live, national TV morning audience that he plans to vote his conscience—for Horatio.

Score it shortstop to first. . . . Or was it a failed sacrifice fly? But who was on?

Never mind. She’s out. Yeah!

Why?

## X.

(TV PLUS)

*Bradwell*, 1873: “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>19</sup>

We’re above even that, right? *Meritor*, 1986: We’ve outlawed “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [having] the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>20</sup>

We’re into this for the long term, and we’ve not yet turned the corner.

---

19. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring) (rejecting a challenge to Illinois’ refusal to license women to practice law).

20. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. §§ 1604.11(a) and (a)(3) (1991)).

The model of the successful manager in our culture is a masculine one. The good manager is aggressive, competitive, firm, just. He is not feminine, he is not soft or yielding or dependent or intuitive in the womanly sense. The very expression of emotion is widely viewed as a feminine weakness that would interfere with the effective business processes.<sup>21</sup>

#### TV and The Opportunist Connection—"Catch 22."

Consider this: Average salary of major league baseball player in 1991: nearly one million dollars. That's right; a one followed by six zeros. And it's okay. Do we still heap scorn on players for leaving the team, our team? Or do we lament our team's failure to raise the ante? This is us. Free market economy, right? We give new meaning to "greener [more G-R-E-E-N in other] pastures." Get what's yours; a whole generation, getting what's theirs.

##### New scene:

Conservative-leaning, reasonably bright, relatively recent minority graduate of leading law school. Anyone will do. Year, mid-1970s. How to get ahead? Make conservative sounds. You're no boob. "A/A"—the dreaded affirmative action—is the rage. Helped you in the past; will help you in the future. But here's the new trick: you must deny its utility. Make speeches, you're no fool. Make conservative noises. "Reverse discrimination." "Equal Opportunity." Denounce your past. Divorce it. STAMP IT OUT!

##### Similar scene:

Conservative-leaning, reasonably bright, relatively recent minority graduate of leading law school, same leading law school, different gender. Anyone will do. Year, late 1970s. How to get ahead? Stick close to man making noises; follow man making noises; he'll get ahead. Does he make other noises? Pubes in coke cans? Long dong shlong and me? Sex sells, right; does he seek a buyer? Maybe.

And it was a very simple cost benefit analysis, really. They told us about this in ANTI-TRUST. A little dirt, a touch of embarrassment, but hey, the concern here's with what's A-H-E-A-D. Don't have to love him; don't have to trust him. Just get what's mine.

Then "AHEAD" gets out of hand. Long Dong's gone too high; Pubes in coke cans. Repulsive. This madness must stop.

The man who muscled his way up from Pin Point . . . with an unshakable belief in his own righteousness and the [Lady] from Morris . . .

---

21. Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 61 (1990) (quoting D. MCGREGOR, *THE PROFESSIONAL MANAGER* 23 (1967)).

whose spiritual integrity is mixed with a fierce ambition must have recognized each other immediately . . . [A] test of wills.<sup>22</sup>

## XI.

### (MIXED[-UP] METAPHORS)

—“Now batting: J”

“I have been harmed. My family has been harmed. I’ve been harmed worse than I’ve ever been harmed in my life. I wasn’t harmed by the Klan . . . I wasn’t harmed by the Aryan race. I was harmed by this process. This process, which has accommodated these attacks on me.”<sup>23</sup>  
Tone—Emotion—TV.

Re-invent the past, High Tech style. (Own your past? Is this Neitzche? Or Rorty’s hero? Where are we?)

### WHY WE GO A-LYNCHING

(Or, the Southern Defense of White Women)

We strike back to the fact that this Southern woman’s place in the Southern mind proceeded primarily from the natural tendency of the great basic pattern of pride in superiority of race to center upon her as the perpetuator of that superiority in legitimate line, and attached itself precisely, and before everything else, to her enormous remoteness from males of the inferior group, to the absolute taboo on any sexual approach to her by the Negro.<sup>24</sup>

Black stereotypes!

And the incomprehensible juxtaposition of positions—Get this:

- I’m not going to answer questions;
- I’m not going to hear the evidence against me.
- Take this job and shove it.
- I’d rather die than “Cry Uncle.”
- This process is Un-American.
- It’s them, not us.

(As if the whole business, “messy unpleasant business,” was somehow avoidable, had some more judicious process been followed from the start.<sup>25</sup> Long Dong, indeed.)

But on reflection, you say, this metaphor is all wrong. “Lynching?” This was Lady and J, not J at the Big House:

22. *The Talk of the Town*, *supra* note 4, at 30.

23. Douglas Frantz, *Emotions Swirl Over Fairness of Hearing Process*, L.A. TIMES, Oct. 13, 1991, at A15.

24. W.J. CASH, *THE MIND OF THE SOUTH* 118 (1941).

25. *Mr. Thomas Goes A-Courting*, THE NEW REPUBLIC, Oct. 28, 1991, at 7, 8.

"[N]o whites are involved. The people who have perpetrated the stereotype are not involved here."<sup>26</sup>

Picky, picky. So what? It sounded s-o-o-o good. "High tech lynching!" Gotcha, eh? Guilt?

New onomatopoeia for the television age.

(THE LADY DOLL)

—"Now pitching, Lady."

Knocked outta there; take a shower. He stole home. Can you believe it? The guy stole home!

The perils of getting ahead, or "Be careful what you pray for! You may get it."<sup>27</sup>

"How could she?" "Following him from job to job?" "The ingrate!" Gold-digger, opportunist, fortune hunter, free-rider, and worse: Black, female, and late. Introducing, "The New Rasheeda Moore."<sup>28</sup>

And: "She didn't come forward." As if the powerless immediately seek succor at the sufferance of the powerful.

"The boys don't get it on this issue."<sup>29</sup> Some never heard this Newtalk!

"There is no smoking gun, . . . no eyewitnesses, no secret tapes to lay doubts to rest and make an easy verdict."<sup>30</sup>

And: "The Fantasy Track."<sup>31</sup> The Exorcist. Senator Hatchet: "I believe that she believes she's telling the truth."<sup>32</sup> Oh really? "Tsk. Tsk."<sup>33</sup> Could this be said of a man? Eh, maybe she just needed a husband. What a decent guy.

One revealing feature of these hearings is the startling realization that [J] . . . might well have said what [Lady] alleges . . . [But r]aising the charges 10 years later was unfair . . . because . . . there is no evidence

26. Interview with Professor John Hope Franklin (National Public Radio, Oct. 12, 1991).

27. Old Yiddish proverb as recounted by Esther K. Blumoff, circa 1988.

28. Woman who worked with FBI to ensnare former Washington, D.C. Mayor Marian Barry. Charge leveled by listener on black-owned radio station. Carl Rowan, *Thomas Mess to Produce Some Surprises on Election Day*, *MACON TELEGRAPH*, Oct. 23, 1991, at A4.

29. Maureen Dowd, *The Thomas Nomination: The Senate and Sexism*, *N.Y. TIMES*, Oct. 9, 1991, at A1 (quoting Rep. Patricia Schroeder).

30. *All Things Considered* (National Public Radio, Oct. 13, 1991) (editorial from the Burlington (Vt.) Free Press).

31. Richard Cohen, *Witch Hunt in the Senate*, *WASH. POST*, Oct. 21-27, 1991, at A23 (weekly ed.).

32. *Id.*

33. *Id.*

she suffered any emotional damage and the punishment she belatedly sought was in no way commensurate with the offense.<sup>34</sup>

"Step right up, Ladies and Gents, get your very own Lady Doll—Pull its string and it talks ten years later."

Poor J; poor victim!

Caesar's minions: "No emotional damage, eh? A phantom tag!"

And this little Piggy cried, "Yea! Yea! Yea!" all the way to THE BENCH!

## XII.

### (INNOCENCE?)

But where's innocence? Victimization demands innocence, dammit. Did J's conduct play a part in the event that caused the loss against which "victimization" is measured? Yes? There's no victim, no way. Crim Law 101; basic crimes. Was J the first aggressor? Pubes in the coke can and Long Dong. Can we truly construct a "victim"?

Ponder this, oh ye who found truth:<sup>35</sup>

1. Most folks believed J over Lady, 2 to 1.
2. Most folks found Lady credible. (Like something happened.)
3. Most judges—yes judges, black robes and all—found Lady more believable than J, 2 to 1. (Perjury? J?)

Can we construct a victim? Sure, it's easy on TV! Call the spin Doctors.

## XIII.

### (A MOMENT'S RESPITE)

Break. Brake? Think about this irony, we readers on lofty planes, above the furies:

When we speak loosely about victims of affirmative action (or the more pejorative, "reverse discrimination"), we assume that a contest about baselines for measurement is settled; and we assume that "victimization" is undifferentiated. Generic advocacy for affirmative action assumes a priori extant standards that apply uniformly to all settings. The "conservative" perspective is clearly over-inclusive, unless we resolve that a single number or measure of aptitude or achievement creates an entitlement to

<sup>34</sup> Orlando Patterson, *Race, Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, § 4, at 15.

<sup>35</sup> Mary Gray, *Sexual Harassment: What Colleges Can Learn From the Thomas Case*, CHRON. OF HIGHER EDUC., Nov. 6, 1991, at A60 (reporting poll taken by the National Law Journal).

some resource irrespective of other criteria for measuring relative entitlement. But the traditional liberal perspective suffers from the same over-inclusiveness, unless we find warrants for the conclusion that identical forces create entitlements in minority and women victims that trump the expectations of majority incumbents or aspirants regardless of context. To still others the idea that whites can be victimized by affirmative action appears incoherent. How, they argue, can one be a victim in a context created by and for whites, and from which they benefitted without competition for centuries?<sup>36</sup> "Victimization" is thorny and conclusory; it carries with it fixed assumptions about our society's order of preference. In fact, those assumptions are hotly contested and wholly constructed.

Here we go again.

Now imagine this: an entitlement to a Supreme Court justice-ship! Only on TV! Only in America! What a country! We bought it. We take the cake.

And Caesar? One of the all-time great players, a Hall of Famer: "I'm so pleased the blacks of this country are supporting Horatio."

#### XIV.

##### (THE GOOD)

TV, TV here too. TV and the reality of a whole group of well-educated, articulate African-Americans; TV and the reality of sexual harassment; TV and the reality of under-representation of women in the process; TV and a healthy fear of majoritarian process; TV and shared experiences. Norman Lear at his best!

#### XV.

##### (A SHORT TRIP HOME)

Imagine a politics rooted in dualisms—two matrices lying on top of one another like colored stencils on an overhead projector. In one matrix, make it horizontal, direction and "progress" battle stasis and regeneration; in the other imagination does battle with reality. But a third modality ever intrudes: Us. Yes, us. We add fragility, an inability to overcome the beings that we are, and an unwillingness—for that is our valiant nature—to ditch the effort. Try this: a child's "slinky" toy, a spiral or circle

---

36. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?* 89 MICH. L. REV. 1222 (1991).

moving simultaneously on two axes, its own rotational axis and a linear axis, but never getting all the way down the stairs unimpeded.

Direction is constructed, a motion picture in which each creates the scene as she or he wishes it. Reality is a snapshot, "Blow-Up"; like now, right now, never here, always mediated by symbol. So, shake hands now; that's us, these bipolarities; we can't escape them. You wanna call L'Affaire Thomas "seriously awry?" Fine, be our guest, but you're guilty, abso-friggin-lutely guilty. Condemned to a cracked mirror, here played out through the Constitution's provision for appointing officers of the United States.

Look, the point here is this: It's like democracy.

## XVI.

(LESSONS? NAH.)

"So, at any rate," Henry James wrote, "fanciful as my plea may appear, I recover the old sense—brave even the imputation of making a mere Rome of words, talking of a Rome of my own which was no Rome of reality. That comes up as exactly the point—that no Rome of reality was concerned with experience, that the whole thing was a rare state of the imagination."<sup>37</sup>

This is not Kafka-esque. This is American. Movin' on down the line.<sup>38</sup>

---

37. See HENRY JAMES, WILLIAM WETMORE STORY AND HIS FRIENDS (1903) (quoted in Tanner, *supra* note 5, at frontlet).

38. THE GRATEFUL DEAD, SKELETONS FROM THE CLOSET.